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CITATIONS

687450—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 884

ALASKA PACIFIC CONSOLIDATED MINING COMPANY, A CORPORATION, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 26) is reported at 56 F. Supp. 698. The opinion of the Circuit Court of Appeals (R. 434) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 19, 1945 (R. 443). The

petition for certiorari was filed on February 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether petitioner's "6–2" wage plan which divides the regularly worked eight-hour day into six "regular" and two "overtime" hours, with an agreed rate of pay for the "regular" hours and 1½ times that rate for the "overtime", satisfies the overtime requirements of Section 7 (a) of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
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> * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section],
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> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This action was instituted by respondent, the Administrator of the Wage and Hour Division, on January 20, 1942 (R. 8), to enjoin petitioner from violating the overtime provisions of the Act. The principal facts are undisputed, as stated in the petition (Pet. 2). Certain additional facts are as follows:

Prior to the effective date of the Act, the respondent employed its workers on a daily or monthly basis (R. 79).[1] Daily wages were paid on the basis of an eight-hour workday; employees were paid proportionately for hours worked in excess of, or fewer than, eight a day, so that, in effect, the daily rates were actually hourly rates of pay (R. 79–80). The monthly salaried employees were paid a definite sum for working generally a 56-hour week (except cookhouse employees, who worked 70 hours a week (R. 79)), receiving additional straight time compensation for additional hours. (R. 80).[2]

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[1] An employee receiving a daily wage generally worked a 56-hour workweek. For work performed in excess of that amount the employee received additional straight time compensation (R. 79).

[2] In addition to cash wages, the Company furnished board and lodging to its employees living at the mine site; a monetary allowance, in lieu thereof, was paid to employees living away from the mine site (R. 177, 186–187). The Circuit Court of Appeals rejected the Company's argument that the reasonable cost of this board and lodging need not be taken into consideration in computing the regular rate because of a provision in its contract that it should be included as part of the overtime compensation. The court below held that since

Just prior to the effective date of the Act, the Company, on October 5, 1938, posted two notices (Ex. 4, R. 61–64). One, entitled "Notice to Employees" (R. 61–63), advised "employes * * * paid on the workday basis of 8 hours" that in order "to comply with the terms of the new Federal Wages and Hours Bill, * * * the workday will be shortened to 6 hours;" that after the Act's effective date, employees receiving a daily wage would be paid a specified hourly rate for "regular" time and 1½ times that rate for "overtime" work.[3] Monthly salaried employees[4] "were transferred over to an hourly wage basis" similar to that established for employees formerly paid a daily wage (R. 62–63). The second notice,

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it was customarily furnished and formed part of the normal weekly income, it must be included in computing the regular rate. The petition does not attack this ruling.

[3] For reference convenience, this brief places the terms "regular" and "overtime" in quotation marks when referring to the Company's designation. The terms are not placed in quotation marks when used in their statutory sense.

[4] Except department heads, office and store and cookhouse personnel (R. 62). In August 1941, however, in order to comply with a "new interpretation of * * * the Wage and Hour law" and because "it made no particular difference to [the Company]," the monthly pay of the cookhouse employees was converted to hourly rates and these employees were required to sign an employment acceptance form (R. 356–358). On February 1, 1942 (subsequent to the filing of this suit), the Company abandoned its position that its other monthly salaried employees, the mechanics, plumber and electrician—were executives and they also were thereupon "put on an hourly basis" (R. 359).

entitled "Notice Regarding Overtime," (R. 63–64), stated that the Company "stands ready to assist [the employees subject to the Act] by allowing each of them, after voluntary application on their part, the privilege of working at least two hours each day overtime, such time to follow and be continuous with the regular six hour shift which will go into effect;" and that if employees wished "to continue working 8 hours each day, as they do now, without any reduction in total wages, they need only sign * * * and such signing will be regarded * * * as an application for such overtime work." The notice added that "It probably is not necessary to point out that if each employee continues to work 8 hours each day, the two hours overtime that that represents would fully compensate for the reduction that we have found it necessary to make in the hourly rate when the 6 hour day becomes effective. In other words * * * all any employee need do to be certain of the same total wages he now receives is to make application for two hours of overtime each day at time and a half pay" (R. 64). On October 24, 1938, a supplemental notice was posted stating that the "proposal regarding overtime" had been accepted by all employees affected by it (R. 66).

When, as frequently happened, employees did not work regular 8-hour shifts, the company did not pay for the first six hours at the "regular" rate and for hours in excess of six at the "over-

time" rate. Instead, it apportioned the "regular" and "overtime" rates to the hours worked in such a manner as to compensate the employee proportionately to the number of hours worked, at a rate based upon the normal daily earnings, including "overtime". (R. 95, 97–99.)

On October 24, 1940, when the statutory workweek dropped from 42 to 40 hours, the Company modified its plan by apportioning "overtime" rates to 4 instead of only 2 of the hours worked on Sunday, thus limiting the "regular" hours to 40 per week (R. 101, 104–105).[5] Petitioner's employment agreements with its workers (R. 95–96, 312) incorporate the wage plan just set forth. See plaintiff's exhibit 6 and defendant's exhibits E and F (R. 67, 202, 203).

The District Court's decision, which was rendered prior to this Court's decision in *Walling* v. *Helmerich & Payne,* 323 U. S. 37, upheld the validity of the plan. The Circuit Court of Appeals reversed its judgment, citing the *Helmerich & Payne* decision and stating that "since the District Court's decision, the Supreme Court has declared a 'split day' plan virtually identical to the one under consideration here (there the division

[5] In the case of employees who have worked more than the normal number of hours during the preceding 6 days of the week, the apportionment of Sunday hours is varied so as to avoid more than 40 hours at "regular" pay during the 7-day period (R. 105).

was 4–4, here it was 6–2) to be a violation of Section 7 of the Act."[6]

ARGUMENT

Petitioner's plan is simply a variation of the Poxon split-day plan held invalid in *Walling* v. *Helmerich & Payne, supra.*[7] As in the *Helmerich & Payne* case, the purpose and effect of the petitioner's plan was "to insure that the total wages for each tour [or day] would continue the same as under the original [pre-statutory] contracts, thereby avoiding the necessity of increasing wages or decreasing hours of work as the statutory maximum workweek of 40 hours became effective" (323 U. S. at 38–39). The present decision accords with that in *Walling* v. *Helmerich & Payne* and does not conflict with the other, less pertinent decisions cited by petitioner (Pet. 6).

[6] The District Court failed to rule on the validity of other types of wage plans used by the Company in connection with particular jobs on which employees were paid at piece rates, including an elaborate plan purporting to provide for work by independent contractors (R. 204–217). In these plans, the Company specified basic and overtime rates which did not take into account the piece rates and bonuses. The Circuit Court of Appeals, relying on this Court's decisions in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, and *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, held these plans illegal also (R. 440–442). The petition does not question the rulings of the court below with respect to these plans.

[7] The eight-hour day or tour in *Walling* v. *Helmerich & Payne* was split into four "regular" and four "overtime" hours, and the ten- and twelve-hour days were split into five "regular" and five and seven "overtime" hours respectively. See 323 U. S. at 38–39.

Petitioner asserts its plan differs from the *Helmerich & Payne* plan because it is "an honest, serious, bona fide effort to conform to the requirements of the Fair Labor Standards Act without penalizing employees with loss of compensation in any situation and without penalizing the employer with additional labor costs which were already the highest in the area" (Pet. 7). This, we submit, is a self-contradiction, and it ignores this Court's emphasis upon the two-fold purpose of the Act to give employees increased compensation for hours in excess of the statutory maximum workweek and to impose additional labor costs upon the employer for such hours. See 323 U. S. at 40; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. at 423–424. The plan here defeats the statutory purposes in precisely the same way and computes the rates in just as "wholly unrealistic and artificial" a manner as did the *Helmerich & Payne* plan. (See 323 U. S. at 40–41, 42.) Here, as there, the plan "enabled [the employer] to avoid paying real overtime wages,[8] * * * thus negativing any possible

[8] Petitioner's contention that its plan is "nothing more or less" than what is recognized as compliance in the case of work performed under the Walsh-Healey Public Contracts Act (Pet. 12–13), is a misapprehension of what occurs in such cases. Inasmuch as the Walsh-Healey Act requires the payment of 1½ times the regular hourly rate of pay for daily hours in excess of eight, such daily overtime compensation is not included in computing the regular rate, and may be credited to weekly overtime compensation due under the Fair

effect such a payment might have had upon the spreading of employment. And the plan was so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-half times the actual regular rate. * * *" (*ibid.*)

Petitioner's plan, like the *Helmerich & Payne* plan, also "violated the basic rules for computing correctly the actual regular rate" (*id.* at 40). The fact that the employee was paid so-called "overtime" for two hours daily whether he worked a 56-hour workweek of seven eight-hour days or whether he worked "only * * * a day or two or three a week," i. e., less than 40 hours (R. 82), suffices to establish that the daily "overtime" was actu-

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Labor Standards Act. See Interpretative Bulletin No. 4, par. 71 (R. 421). Obviously, this is quite different from dividing a normal eight-hour workday into purely fictitious "straight time" hours and "overtime" hours. See Interpretative Bulletin No. 4, par. 70 (4) (R. 418). Under the Walsh-Healey Act, as under the Fair Labor Standards Act, the overtime compensation must be based upon the actual regular rate (as shown, for example, by the rates paid by the employer for similar work not subject to the Walsh-Healey Act, by the rates at which deductions for absences are made, and by other pertinent facts showing the true regular rate). Therefore such cases involve true daily overtime compensation. In the instant case, the two hours of alleged "overtime" were part of the normal, regular working hours; there was no true daily overtime, but only "ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale." 323 U. S. at 41.

ally "a normal and regular part" (*Walling* v. *Harnischfeger Corp.*, 325 U. S. at 432) of the employee's pay "for ordinary, non-overtime hours" (323 U S. at 41), and should, therefore, "automatically enter into the computation of the regular rate for purposes of § 7 (a)." (*Walling* v. *Harnischfeger Corp.*, 325 U. S. at 432.) As in the *Helmerich & Payne* case, "When an employee on regular eight-hour tours had actually worked 40 hours, [the employer] could point to the employee's contract and claim that he had worked only 20 [here 30] 'regular' hours and 20 [here 10] 'overtime' hours," and could avoid applying the regular rate to "the first 40 hours actually and regularly worked" (323 U. S. at 41, 42).

Petitioner emphasizes as the primary feature distinguishing its plan from the *Helmerich & Payne* plan the fact that here the plan designates not only which daily hours shall be "regular" but also which 40 hours shall be considered the "regular" workweek. Its contention that even the 4–4 split day plan "would be valid too, if the regularly scheduled and regularly worked non-overtime work week was 40 hours" (Pet. 14), evidences a misconception of the significance of this Court's recent decisions concerning Section 7 (a). Were "the cleavage between validity and non-validity * * * as simple as that" (Pet. 14), the repeated emphasis in this Court's de-

cisions in the *Helmerich & Payne, Harnischfeger,* and *Youngerman-Reynolds* cases upon the purposes of the statutory requirements would have been pointless. The "vice" of the *Helmerich & Payne* plan was not, as petitioner contends, that no 40-hour workweek was designated, but "that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor * * * allow extra compensation to be paid for true overtime hours" (323 U. S. at 41). The plan here has precisely the same vice. To accept as a distinction the superficial "difference" urged by petitioner would indeed "exalt ingenuity over reality" (*id.* at 42).[9]

CONCLUSION

The decision of the court below is in accord with the applicable decisions of this Court and there is no occasion for it to be reviewed. We

[9] Petitioner's contention that the vice which invalidated the *Helmerich & Payne* plan was simply its failure to designate the 40 hours to be considered as the regular workweek is also refuted by this Court's recognition in the *Helmerich & Payne* opinion of the similarity between the plan there involved and that described and disapproved in Interpretative Bulletin No. 4, par. 70 (4). See 323 U. S. at 41–42, n. 5. The plan described in paragraph 70 (4) of the Bulletin divided the normal workday of eight hours into 6⅔ "regular" hours and 1⅓ "overtime" hours and also provided that the first 6⅔ hours of six workdays should constitute the regular 40-hour workweek.

respectfully submit that the petition for certiorari should be denied.

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